Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1978

No. 78-183 Misc.

SAMMIE JOE MINIX

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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SAMMIE JOE MINIX

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

Sammie Joe Minix, by counsel, Frederick J. Graf of Martz, Beattey, Hinds & Wallace, and William F. Wurster, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Indiana, Third District, affirming Petitioner's conviction of two counts of theft of over $100 and one count of attempted arson in the Starke County Circuit Court, State of Indiana.

OPINION BELOW

The opinion of the Court of Appeals of Indiana, Third District, is a **"Memorandum Decision"** designated by that Court "NOT FOR PUBLICATION". It was filed September 14, 1977, and it is reproduced in Appendix "A" of this Petition. Rehearing was denied November 16, 1977, without opinion respecting Petitioner's Petition for Rehearing reproduced in Appendix "B". Thereafter, the Indiana Supreme Court denied transfer May 9, 1978, without opinion respecting a Petition for Transfer worded substantially like Petitioner's prior Petition for Rehearing (Appendix "B").

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of its Rule 19 because the case presents a determination of both an Indiana and a federal question of substance by a state court in a way contrary to applicable decisions of this honorable Court. Specifically, jurisdiction is invoked under the mandates of the Sixth and Fourteenth Amendments to the Constitution of the United States; also, it is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. **Whether or not Petitioner was deprived of his right to a fair trial by the Trial Court's action of forcing Petitioner to go to trial represented by a "hostile" paid legal counsel?**

2. **Whether or not Petitioner was deprived of his right to a fair trial by the Trial Court's refusal to grant Petitioner a continuance of only a few days to obtain "sympathetic" counsel?**

3. **Was Petitioner deprived of a fair trial by the Trial Court's refusal to grant him a continuance to obtain friendly counsel, of Petitioner's own choosing, when the Trial Court knew that Petitioner's hostile counsel "of record" had failed and refused to timely turn over Petitioner's records to new counsel?**

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Constitution of the United States of America, Amendent XIV, §1 (1868) provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state *deprive any person of* life, *liberty*, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis Added)

2. The Constitution of the United States of America, Amendment VI (1791) provides:

> "*In all criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.*" (Emphasis Added)

3. The Bill of Rights of the Indiana State Constitution (1851) provides:

"§12. **Courts open — Due course of law — Administration of justice.** — All courts shall be open; and *every man*, for injury done to him in his person, property, or reputation, *shall have remedy by due course of law*. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

"§13. **Rights of accused.** — *In all criminal prosecutions, the accused shall have the right* to a public trial, by an impartial jury, in the county in which the offense shall have been committed; *to be heard by himself and counsel;* to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." (Emphasis Added)

The right to counsel in an Indiana criminal prosecution is self-executing and does not depend upon legislative authorization. *Knox County Council v. State ex rel. McCormick* (1946), 217 Ind. 493, 29 N.E. 2d405, 130 A.L.R. 1427.

4. 28 U.S.C., Section 1257 (3) provides:

"*Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, *may be reviewed* by the Supreme Court as follows:

***

"(3) *By writ of certiorari*, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any* title, *right*, privilege or immunity *is specially set up or claimed under the Constitution*, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (Emphasis Added)

STATEMENT OF THE CASE

Petitioner respectfully submits that Federal Constitutional questions were timely and properly raised so as to give the Supreme Court of the United States jurisdiction to review the judgment of the highest acting state court (of Indiana) on Writ of Certiorari.

The original action was commenced by the return of an Indictment against the Petitioner, Sammie Joe Minix, charging him in four counts, one count of Arson and three counts of Theft as of the 11th day of April, 1975. On April 14, 1975, Petitioner was arrested. Petitioner employed an attorney-at-law ("Lawyer A") to represent him. On May 5, 1975, Lawyer A entered on appearance for Petitioner. On March 9, 1976, almost a year later, the Trial Court set the matter for trial to begin April 5, 1976.

Lawyer A filed a pre-trial Motion for Discovery on March 19, 1976. The motion was granted. On March 25, 1976, Lawyer A notified the Trial Court that the Petitioner allegedly had not contacted Lawyer A nor responded to notices from Lawyer A. The Trial Court thereupon set March 30, 1976, as the time for holding a pre-trial conference. A rift of incompatibility developed between attorney and client (Lawyer A and Petitioner) when, at the pre-trial conference on March 30, 1976, Lawyer A accused the Petitioner of lying about the lack of preparation for trial. A week prior to Petitioner's trial, Lawyer A informed the Petitioner that he no longer desired to represent the Petitioner.

Petitioner became dissatisfied with his attorney because his Lawyer A had told him that he did not want to represent him any longer. Petitioner also stated that Lawyer A called him a liar. Petitioner contacted another attorney ("Lawyer B") about one week prior to trial. Lawyer B telephoned the trial judge to request a short continuance; when the judge

indicated that the continuance would not be granted, Lawyer B declined to take Petitioner's case. Petitioner contacted yet a third attorney ("Lawyer C"), and that attorney contacted Lawyer A for files and papers which he would need for the defense. The third attorney (Lawyer C) did not receive such files until 48 hours before trial; therefore, Lawyer C also declined to take the case on such short notice.

The day of trial, Petitioner, himself, orally begged the trial judge for a continuance so that a new attorney would have time to prepare. The Petitioner stated, "I feel that it just ain't right, that's just the way I feel." The judge denied Minix's request for a continuance. When asked if he intended to proceed with the trial with Lawyer A as his counsel, Petitioner responded in resignation, "guess I got no other choice, but I feel I'm not getting a fair shake in this." Petitioner Minix thus grudgingly agreed to, and did, go to trial with his original attorney, Lawyer A.

The jury trial commenced April 6, 1976, and Petitioner was found guilty on two counts of theft and one count of attempted arson. The Trial Court rendered judgment April 27, 1976. A timely appeal was prosecuted by Petitioner before the Indiana Court of Appeals. It is from that appeal that the instant relief is sought from this honorable Supreme Court of the United States.

REASONS FOR GRANTING WRIT

The affirmance of the Trial Court judgment by the Court of Appeals of Indiana rests upon a misconception of the basic attorney-client issue involved. The issue is not the competency of the attorney (Lawyer A) who defended Petitioner at the hastily conducted jury trial. It is not the degree of hostility that existed between Petitioner and Lawyer A, who took on the defense of Petitioner. Instead,

the real issue is the Trial Court's arbitrary refusal to give Petitioner even a two-day trial continuance so that Petitioner might obtain the services of non-hostile counsel, such as either Lawyer B or Lawyer C.

The big difference between this case at bar and the cases cited by the Indiana Court of Appeals (See Appendix "A") concerning the denial of *effective assistance of counsel* is that in this case Minix pointed out to the Trial Court, through his own oral motion, through his Lawyer B, and through his Lawyer C, the pre-trial existence of hostility (between Minix and Lawyer A) and his desire to have counsel who was not hostile to him. When these facts were made known to the Trial Court, that there was hostility, and when the client-defendant made the fact known to the Trial Court and requested a trial continuance, and other attorneys on behalf of the client-defendant requested continuances, the Trial Court should have at least granted a few days continuance. The hostility of Lawyer A was clearly shown when he failed to make a motion on behalf of his client-defendant for a continuance, setting out the acknowledged hostility; but, instead, forced the uneducated defendant to try to preserve his own error.

Minix thus had no choice but to proceed with the Lawyer A when his motion for continuance was denied. The Trial Court clearly abused whatever discretion remained to it in not granting Minix at least a short continuance and allow him to employ counsel which was not hostile to Petitioner's best interests. The Indiana Court of Appeals needed to stretch further (see Appendix "A" hereto for its search of the record) for means to sustain the pre-trial continuance ruling by the Trial Court and allow Lawyer A's continuing participation as counsel for the Petitioner.

The right to counsel is fundamental to the American system of justice. This right necessarily embodies the

corollary right to effective counsel. To be effective, counsel must be given sufficient opportunity to adequately prepare his case. *Hartman v. State* (1973), 155 Ind. App. 199, 292 N.E.2d 293; *Lloyd v. State*, (1960) 241 Ind. 192, 170 N.E.2d 904.

Petitioner contends that the failure of the Trial Court to grant a trial continuance to retain non-hostile legal counsel to prepare his defense amounted in substance to a denial of his right to the assistance of counsel as guaranteed by both the state and federal constitutions.

Powell v. Alabama (1932), 237 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, established the proposition that the right to assistance of counsel includes, as a necessary corollary, the right to adequate time for preparation. The Indiana courts have recognized this principle in several cases. Thus, "[w]here a defendant is not granted sufficient time after the appointment of counsel, to prepare his defense, it amounts in substance to a denial of the right to counsel as guaranteed by Art. I, § 13 of the Indiana Constitution..." *Sweet v. State* (1954) 233 Ind. 160, 117 N.E.2d 745, 746.

However, courts are reluctant to "fix a minimum period of time which must be allowed...in every case between the time of the appointment or employment of counsel and the commencement of trial." *Lloyd v. State*, supra, at N.E.2d 907. The adequacy of time allowed for preparation must be determined on a case by case basis, considering the totality of the circumstances, including the complexity of the issues, the necessity for pre-trial motions, the necessity to interview witnesses and whether the defendant is available to assist in the preparation of his defense. *Jones v. State* (1978), ___ Ind. App. ___, 371 N.E.2d 1314.

In the instant proceeding Petitioner was never granted a single continuance prior to trial despite the fact that the Trial Court, itself, took nearly one (1) year to set the case for trial. The Court's sudden pangs of urgency are unexplained.

The law in Indiana clearly dictates that a Defendant's request for a continuance under the existing circumstances be granted. The Indiana Supreme Court has held it to be reversible error to refuse a request for continuance by counsel who was employed by a Defendant immediately after original counsel withdrew. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951). The Trial Court's refusal of a trial continuance is tantamount to holding that an accused does not have the right to employ sympathetic counsel of his own choice.

The right to counsel as guaranteed by *Section 13 of Article I of the Indiana Constitution* is of such a fundamental character that the denial of such right by the State is a denial of due process of law. *Spence v. Dowd*, 145 F.2d 451 (7 Cir. Ind. 1945).

There is no reason to believe that Petitioner's request for a continuance was motivated by delay or any reason other than the emergent incompatibility with Lawyer A. With his liberty at stake, the Petitioner chose to be represented by different counsel. But, the Trial Court's refusal of Defendant's and Lawyer B's requests for a continuance placed an unjustifiable restriction upon Mr. Minix's constitutional right to due process of law. *United States v. Cozzi*, 354 F.2d 637 (7 Cir. Ind. 1965). The prompt disposal of criminal cases cannot be accomplished by clipping, modifying, or stripping the fundamental rights of a defendant. *Bradley v. State* (1949), 227 Ind. 131, 84 N.E.2d 580.

Article 1, § 13 of the Constitution of Indiana, guarantees to an accused the right of counsel. The same right is guaranteed by the *Sixth Amendment of the Constitution of the United States.* It was held in *Powell v. Alabama, supra*, that the specific provision of Article 6 did not exclude that right from the protection of the "due process" clause of the

Fourteenth Amendment. In *Johnson v. Zerbst, Warden*, (1937), 304 U.S. 358, 58 S.Ct. 1019, 1024, 82 L.Ed. 1461, 146 A.L.R. 357, the court said: "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."

There is more to defending an alleged criminal defendant than just sitting through the trial and making objections and asking questions. Every bit as important and possibly the most important are the three (3) contacts where the attorney for an alleged criminal defendant has contact with the jury, during voir dire, opening statement, and final argument. If there is a hostile feeling between the alleged criminal defendant's attorney and the defendant, it is bound to show through. Hostility between a client and an attorney has no place in our system of justice. The alleged criminal defendant is subjected to an adversary proceeding with the great State of Indiana on the other side. There can be no compliance with guaranteeing a fair trial to a criminal defendant as guaranteed by the *Sixth Amendment* and *Forteenth Amendments to the Constitution of the United States* if the alleged criminal defendant's own attorney is even possibly against him. Failure to grant a single trial continuance of a couple days was a flagrant abuse of the judicial functioning of the Trial Court. Compare *Wilson v. State* (1943), 222 Ind. 63, 51N.E.2d 848.

Upon the entire record here it is apparent Petitioner did not waive his right to counsel, and that he was denied his constitutional right to be heard by counsel of his own free choosing.

CONCLUSION

For all the reasons stated hereinabove, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE

Court of Appeals of Indiana

THIRD DISTRICT

(Opinion issued September 14, 1977)

SAMMIE JOE MINIX, *Appellant - Defendant,*	)	
v.	)	NO. 3-1176 A 259
STATE OF INDIANA, *Appellee-Plaintiff*	)	

APPEAL FROM THE STARKE CIRCUIT COURT
Honorable Marvin D. McLaughlin, Judge

STATON, P.J.

MEMORANDUM DECISION

Sammie Joe Minix was convicted on two counts of theft of over $100 and one count of attempted arson. On appeal, Minix proffers two issues for our examination and review:

(1) Did the trial court err in denying Minix's request for a continuance based on Minix's feeling that he was not represented by effective counsel?

(2) Did the trial court err in denying Minix's motion for a directed verdict and motion to correct errors in that the State failed to prove the necessary value of property involved in each of the theft charges?

We find no reversible error, and we affirm.

I. Continuance

Minix alleges that he became dissatisfied with his attorney because his attorney had told him that he did not want to represent him any longer. Minix also states that his attorney called him a liar. Minix contacted another attorney about one week prior to trial. The attorney telephoned the trial judge to request a continuance; when the judge indicated that the continuance would not be granted, the attorney declined to take Minix's case. Minix contacted yet a third attorney, and that attorney contacted Minix's original attorney for files and papers which he would need for Minix's defense. Minix states that the third attorney did not receive such files until 48 hours before trial and that the third attorney also declined to take the case on such short notice. The day of trial, Minix himself orally asked the trial judge for a continuance so that a new attorney would have time to prepare. The judge denied the motion for a continuance. Minix grudgingly agreed to go to trial with his original attorney, "I guess I got no other choice, but I feel I'm not getting a fair shake in this."

A trial court is accorded wide discretion in ruling on a motion for a continuance. *Schumann* v. *State* (1977), ___ Ind. App. ___, 360 N.E.2d 277. The granting of a continuance upon other than a statutory ground is within the discretion of the trial court, and the exercise of such discretion will be disturbed only for clear error. See IC 1971, 35-1-25-1 (Burns Code Ed.); *Works* v. *State* (1977), ___ Ind. ___, 362 N.E.2d 144. When a trial court denies a motion for continuance, the record must disclose that the defendant was prejudiced by the denial. When prejudice is disclosed, an abuse of discretion exists. *Schumann* v. *State*, *supra*.

On appeal, Minix cites the trial court's denial of the continuance as error which resulted in his being denied a fair trial and right to counsel. We must look then to the trial

and to the representation afforded Minix and determine whether he had effective assistance of counsel. Our standard is whether counsel was so ineffective as to be shocking to the conscience of the Court and a mockery of justice. *Blackburn* v. *State* (1973), 260 Ind. 5, 291 N.E.2d 686. There is a presumption that counsel has been competent. *Cheeks* v. *State* (1977), ___ Ind. ___, 361 N.E.2d 906; *Roberts* v. *State* (1977), ___ Ind. ___, 360 N.E.2d 825. The burden is on Minix to present strong and convincing proof to overcome such presumption. *Greentree* v. *State* (1976), ___ Ind. ___, 351 N.E.2d 25.

The record discloses that Minix's attorney filed pre-trial motions and participated in pre-trial conferences with Minix. He made numerous strenuous and well-taken objections at trial. He located and produced character witnesses for Minix. Despite Minix's allegations that his relationship with his attorney was so strained that an adequate defense was impossible, the record shows many instances where the attorney and Minix conferred as direct or cross examination was in progress. These conferences negate the tale of violent hostility told by Minix.

Minix does not actually argue that his attorney did not zealously represent him; the record would not support such an allegation had it been made. Minix does propose that since he and his attorney had been in some disagreement prior to trial that *ipso facto* the attorney could not have had his heart in Minix's defense. A constitutional right to a fair trial and assistance of effective counsel does not import a right to ideal rapport with counsel. *See Sacks* v. *State* (1977), ___ Ind. App. ___, 360 N.E.2d 21. We may only examine the trial and answer the question of whether Minix was harmed. Our review of the entire trial does not lead us to the conclusion that this trial was a sham and a mockery of justice. *Robertson* v. *State* (1974), 262 Ind. 562, 319 N.E.2d 833.

II. Proof of Value

Minix was convicted on two different counts of theft of over $100. He states that although the State proved that certain items were stolen, no evidence as to the value of the items was given. Thus, the essential elements of the crimes charged are missing. Count Two related to theft of articles from a trailer and shed. An inventory listing at least 32 items was prepared by the person from whom the items were stolen. On that same inventory, the owner had estimated the value of the items taken to be in excess of $1600. This inventory list was introduced into evidence and explained by testimony of the owner. There was sufficient evidence from which the jury could have reasonably inferred that the value was over $100.

Count Four also charged Minix with theft of over $100. Minix was found guilty of stealing a John Deere, eight horsepower riding lawnmower. The evidence in the record was that the mower had been purchased about one year before the theft for $457. We believe that this was sufficient evidence to warrant a conclusion by the jury that property was taken which had a value in excess of $100. It is not the exact value of the goods which the State is required to prove, but whether the value of the goods exceeds $100. *Willoughby* v. *State* (1969), 252 Ind. 13, 245 N.E.2d 167.

We conclude that there was sufficient evidence on each Count from which the trier of fact could reasonably have found that the items had values in excess of $100. *Hancock* v. *State* (1971), 256 Ind. 337, 268 N.E.2d 743. The court did not err in denying Minix's motion for a directed verdict and motion to correct errors.

Finding no reversible error, we affirm.

HOFFMAN, J. and GARRARD, J., Concur.

APPENDIX "B"

IN THE

Indiana Court of Appeals

SAMMIE JOE MINIX Appellant (Defendant Below).	)	CAUSE NO. 3-1176A259
vs.	)	Appeal from the
STATE OF INDIANA Appellee (Plaintiff Below).	)	Starke Circuit Court The Honorable Marvin D. McLaughlin, Judge

APPELLANT'S PETITION FOR REHEARING

Comes now the Appellant-Defendant, Sammie Joe Minix, by counsel, and respectfully requests this Court to grant a rehearing in the above-captioned cause for the following reasons:

1. Appellant's appeal was decided by Memorandum Decision on September [illegible]77, in which this Court affirmed Appellant's convictions of arson and two counts of theft.

2. The Memorandum Decision is in error in each of the following particulars:

(a) In deciding that the Appellant was not denied a fair trial when the trial court denied requests for a continuance made by Appellant's newly retained counsel prior to trial and by Appellant at trial, the Memorandum Decision contravened ruling precedent of the Indiana Supreme Court in the case of *Bolkovac v. State*, 229 Ind. 294, 98 N.E.

2d 250 (1951). For further discussion, refer to Issue I of Appellant's Brief In Support of his Petition for Rehearing;

(b) In deciding that the Appellant was not denied a fair trial when the trial court denied requests for a continuance made by Appellant's newly retained counsel prior to trial and by the Appellant at trial, the Memorandum Decision discussed only the trial court's discretion and ignored evidence of constitutional dimension in the record (p. 100-102; p. 325-326) and argued by counsel (Appellant's Brief p. 2-3; p. 14-18). For further discussion, refer to Issue I of Appellant's Brief In Support of his Petition For Rehearing;

(c) In deciding that the Appellant was not denied fair trial by the irregularities of the trial proceedings although the evidence established that the Appellant's Motion For Change of Venue From the County was denied after a showing of actual prejudice due to intense pretrial publicity; that Court's Final Jury Instruction No. 4 instructed the jury that a verdict could be returned against the Appellant for attempted arson; that Appellant was forced to proceed to trial with ineffective counsel; and that Appellant's conviction was based wholly upon uncorroborated testimony of the admitted perpetrator's of the crimes charged against Appellant. For further discussion, refer to Issue II of Appellant's Brief In Support of his Petition For Rehearing;

(d) In failing to correct fundamental error created when the trial court instructed the jury that a verdict could be returned against the Appellant for attempted arson (Record p. 71). Although such action is in compliance with ruling precedent of the Indiana Supreme Court, *Crump v. State*, 295 Ind. 358, 287 N.E. 2d 342 (1972), that case is erroneous and inconsistent with the other case law. For further discussion, refer to Issue II(B) of Appellant's Brief In Support of his Petition For Rehearing;

(e) In deciding that there was sufficient evidence to find the Appellant guilty of theft in Count IV where there is no evidence that the stolen property had a value in excess of $100 at the time of the occurrence. For further discussion, refer to Issue III of Appellant's Brief In Support of his Petition For Rehearing;

(f) In deciding that there was sufficient evidence to find the Appellant guilty of theft in Count II where there was no competent evidence that the stolen property over which the Appellant arguably had control had a value in excess of $100 at the time of the occurrence. For further discussion, refer to Issue IV of Appellant's Brief In Support of his Petition For Rehearing;

(g) In ignoring the question of whether the Appellant ever had "control" over the stolen property enumerated in Counts II and IV of the indictment, which issue was presented to this Court for consideration in paragraphs 1(c) and (d) of Appellant's Motion To Correct Errors (Record p. 1-2). For further discussion, refer to Issue V of Appellant's Brief In Support of his Petition For Rehearing.

For each of the above-specified reasons, the Appellant respectfully requests this Court to grant a rehearing and reverse its decision.

/s/ TONY H. ABBOTT
Tony H. Abbott
Attorney for Appellant-Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded to Theodore L. Sendak, Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204, and David J. Wallsmith, Prosecuting Attorney for Starke County, Courthouse, Knox, Indiana, this 4th day of October, 1977.

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FROM THE INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not Petitioner was deprived of his right to a fair trial by the Trial Court's action of forcing Petitioner to go to trial represented by a "hostile" paid legal counsel?

2. Whether or not Petitioner was deprived of his right to a fair trial by the Trial Court's refusal to grant Petitioner a continuance of only a few days to obtain "sympathetic" counsel?

3. Was Petitioner deprived of a fair trial by the Trial Court's refusal to grant him a continuance to obtain friendly counsel, of Petitioner's own choosing, when the Trial Court knew that Petitioner's hostile counsel "of record" had failed and refused to timely turn over Petitioner's records to new counsel?

STATEMENT OF THE CASE

The Petitioner, Sammie Joe Minix, was convicted in the Starke Circuit Court of Starke County, Indiana, on two counts of theft of over $100 and one count of attempted arson. On September 14, 1977, the Third District of the Indiana Court of Appeals affirmed the conviction in an unpublished Memorandum Decision. (Petitioner's Brief, Appendix A).

Petitioner's Petition for Rehearing was denied November 16, 1977, and the Indiana Supreme Court denied the Petition for Transfer May 9, 1978.

STATEMENT OF THE FACTS

The facts relevant to this petition reveal that the Petitioner was tried by jury on April 6, 1976. Immediately preceding the trial, the Petitioner moved for a continuance for the purpose of changing attorneys. The motion was denied and the Petitioner agreed to have his original attorney represent him at trial.

ARGUMENT

The Petitioner contends that the trial court's refusal to grant his motion for a continuance denied him his right to counsel and was consequently a denial of due process.

The law in Indiana is clear that the granting of a continuance upon other than a statutory ground is within the discretion of the trial court. Upon review, the Court may overrule the trial court's decision only if it finds an abuse of discretion. I.C. 35-1-26-1; Indiana Trial Rule 53.4;

Works v. State, (1977) —— Ind. ——, 362 N.E.2d 144. In order to show an abuse of the trial court's discretion, the record must disclose that the defendant was prejudiced by the denial of his motion. *Schumann v. State,* (1977) —— Ind. App. ——, 360 N.E.2d 277.

Likewise, this Court has consistently held that the granting of a continuance is within the discretion of the trial court. "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar v. Sarafite,* (1964) 376 U.S. 575, 84 S.Ct. 841.

Following this reasoning, the Court of Appeals for the Seventh Circuit in *United States v. Rothman,* (7th Cir. 1977), 567 F.2d 744, decided there was no abuse of discretion where the trial court had fully weighed and considered the matter of a continuance. The Court stated, "[T]he necessary expeditious disposal of criminal cases requires the most effective use of the time permitted for trial preparation without reliance upon the routine continuances that may have been customary in the past."

In order for the Petitioner to show that the trial court abused its discretion in denying his motion for a continuance, he must demonstrate how he was prejudiced by the denial.

The Petitioner fails to point out in both his Appellant's brief and his Petition for Writ of Certiorari any single action that was prejudicial to him. He does not specifically allege that his attorney did not zealously represent him. The Petitioner has failed to demonstrate any way in which he was prejudiced by the denial of his motion for a continuance.

The record reveals that the defendant, at trial, was afforded his right to effective counsel. Both before and

during trial the defendant's attorney represented him competently and zealously. The record fails to disclose any way in which the defendant was not afforded his constitutional right to a fair trial as well as effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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